FILED
JUN 11 1949
CHARLES ELMORE CROP
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No. ~~856~~ 112

UNITED STATES OF AMERICA

IN THE

Supreme Court of the United States

October TERM ~~No.~~ 1948

ANTHONY CARR,

Petitioner,

vs.

NATIONAL DISCOUNT CORPORATION,
an Indiana corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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ECLIPSE BRIEF AND RECORD SERVICE. PHONE WO. 2-9586

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Petition for Writ of Certiorari

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, Anthony Carr, respectfully shows:

SUMMARY STATEMENT OF MATTER INVOLVED

The principal question involved is whether the District Court erred in its application of the Michigan law of false imprisonment when it directed a verdict (91) of no cause of action at the conclusion of Petitioner's case. Petitioner is plaintiff in this action of false imprisonment and his complaint (1 to 4) alleges false arrest and detention of himself on two different dates, October 18th and 21st, 1946. Trial was to a jury and at the conclusion of Petitioner's evidence, the District Court directed a verdict of no cause of action. The judgment was affirmed by the Circuit Court of Appeals for the Sixth Circuit on January 31, 1949, (172 F. 2d 899) and petition for rehearing was denied on March 14, 1949. (137)

Principal Question of Law for Consideration

The principal question of law to be considered in this case is whether the District Court and the Circuit Court of Appeals decided an important question of local law in a way which is in conflict with applicable local decisions. It is the contention of the Petitioner that in this case, involving an important fundamental matter of Michigan law, both lower Federal Courts refused to follow that law and consequently put the decisions of the Federal Courts in the Sixth Circuit in conflict with the Michigan decisions on the subject of false imprisonment, and failed to follow the ruling of *Erie Railroad* v. *Thompkins*, 304 U.S. 64. Applicable Michigan law provides without exception that any imprisonment made by a person or corporation,

or instigated by the same, is prima facie false imprisonment, and the burden is then shifted to the defendant to prove justification in an affirmative special plea of justification or probable cause in mitigation of punitive damages. *Barker* v. *Anderson,* 81 Mich. 508, 511-512; *Thompson* v. *Stoddard,* 112 Mich. 687; *Tubbs* v. *Haessig,* 149 Mich. 185. In the instant case, Plaintiff-Petitioner made such a showing and there was no affirmative special plea of justification by the defendant. In spite of this, the District Court directed judgment of no cause for action at the conclusion of the Plaintiff's proofs (80) and before any testimony was put in by the defendant, and the Circuit Court of Appeals affirmed this action.

Summary of Evidence

Petitioner is a used car dealer in Hamtramck, a Detroit suburb, and Respondent is a corporation which financed Petitioner's business by what is known as a "floor plan mortgage" on the dealer's stock in trade. (14 to 16) Under the "floor plan mortgage" system of financing the dealer kept possession of the motor vehicles so mortgaged. Upon a sale to a customer of any of these automobiles subject to the "floor plan mortgage", the Petitioner, according to custom and usage, paid to Respondent the amount of the floor plan loan allocable to the automobile sold.

The defendant corporation held physical possession of certificates of title to the cars, although said certificates were not assigned to it. According to custom, during this arrangement, Petitioner was permitted to sell the vehicles

to purchasers without first obtaining a release from the Discount Corporation and to pay the Discount Corporation on the day following the sale of a car the required portion of the mortgage, (16) at which time, the certificate of title for the car would be delivered to the dealer.

In the latter part of September, 1946, two cars subject to floor plan mortgage, which brought about the dispute in this case, were sold from the Petitioner's used car lot (21). A Buick was sold to one Chester Oberznek for cash by one of Petitioner's salesmen who absconded with the money. At approximately the same time, a DeSoto was sold by Petitioner to one Al Gardas, also for cash. Petitioner did not learn of the sale of the Buick for more than a week after the sale, and the Respondent Discount Corporation was not informed of either sale until approximately October 3rd. On October 8th, the Discount Corporation repossessed itself of all the cars remaining on Petitioner's lot and also of the Buick car sold to Oberznek. It was unable to repossess the car sold to Gardas, however, because Gardas, learning of the Respondent's intentions, had hidden the vehicle. (54)

On October 18, 1946, Petitioner was arrested without a warrant by the Hamtramck Police. (27) The following day one Brennen, an agent of Defendant, saw Petitioner and demanded from him $2,210.00 to cover the floor plan lien on the Oberznek and Gardas cars. Petitioner was unable to furnish this amount, and Brennan instructed the police to hold him until he produced the $2,210.00 owed on the two cars. (28) Gardas and Oberznek were not present at this time and did not arrive at the police

headquarters until a day after Petitioner had been arrested. After Petitioner had spent more than two days in jail, the Petitioner's wife was able to raise the $2,210.00 demanded by the finance company, and on October 21st delivered that amount to the Hamtramck police. Thereupon, at 2:30 a.m. October 21, 1946, the Hamtramck police released Petitioner. (30) Later the same day, October 21st, Petitioner was rearrested and held in jail over night. (30) The morning of October 22, 1946, Petitioner was taken to the office of the Wayne County Prosecutor where a conference was held with the Prosecutor and two representatives of Respondent corporation, Maurice Harte and Mark Young. At that conference after being told that the Hamtramck police was holding the $2,210.00 for Respondent corporation, the Assistant Prosecutor stated, "Since when is the Hamtramck Police Department a collection agency for National Discount?" (31) The money was then turned over by the Hamtramck police to Petitioner who, in their presence, was required to give it to Harte and Young, the representatives of the Discount Company (31). At this time, upon receiving the money from the Hamtramck police, Petitioner executed a receipt which is part of the official Hamtramck Police Department Report on this case, which receipt provides, "This money was held by the Hamtramck Police Department for the National Discount Company on Buick Sedan, 1942 model, Motor No. 44872804, for the amount of $1,468.54, ,and DeSoto car. Mortgage on both cars $2,210.00." (87, 88) Thereupon, Petitioner was released by the police a second time. Upon leaving the building he had a conversation with Harte, the Respondent's agent,

who admitted to him at that time that they, Respondent's agents, were responsible for having him arrested in this case (32).

No warrant was ever issued for Petitioner's arrest, and no intention to prosecute Petitioner appears. The arrest and detention of Petitioner was the direct result of the action of the Respondent company. It was only upon payment of the money demanded by Respondent company and upon the authority of Respondent's agent, Brennen, that Petitioner was released from custody.

Summary of Pleading and Court Action

Petitioner's complaint in the District Court alleges false arrest and detention on the two separate dates mentioned above; that such arrests and detentions were caused, procured and directed by the Respondent's agent; that the acts of the Respondent's agent were ratified and that Appellant was released upon the payment of $2,210.00. The Answer by Respondent denies any authority in its agents to cause, procure or direct the arrest of the petitioner, and denies its authority to ratify or confirm the acts of its agents. Respondent further denies that it made any complaint to the Hamtramck Police and sets forth affirmatively that the Appellant was arrested for the issuance of checks with insufficient funds. The Answer further alleges that Petitioner disposed of chattel mortgaged property, contrary to law, and that there was justification for the arrest of Petitioner by the police although Respondent denies that it had any part therein. Respondent does not plead its own justification (1 to 7).

At the conclusion of the Petitioner's case, the District Court directed a verdict of no cause for action, giving as its reason that the Petitioner was in jail because of his own wrongful acts, i.e., issuing checks with insufficient funds, and also that it was lawful to arrest a person to collect money (77 to 80). Appeal was taken to the Circuit Court of Appeals for the Sixth Circuit and judgment was entered on January 31, 1949, affirming the dismissal by the District Court (99). Petition for re-hearing was denied on March 14, 1949 (137). In its opinion on the case, and on the petition for re-hearing, the Circuit Court of Appeals, speaking through Judge Simons, held that under Michigan law one may not be held liable for false arrest unless it was brought about without probable cause by his direct participation or by his indirect procurement, (104) and that one who merely gives information regarding an offense does not incur liability although the party giving the information acts maliciously or without probable cause. (102-103) The opinion further, in denying the petition for re-hearing, rejects the established law of Michigan that mere arrest establishes a prima facie case of false imprisonment. (137) It is on these three bases that the opinion affirmed the judgment of the lower court.

JURISDICTIONAL STATEMENT

Jurisdiction of this Court is based on Title 28, Sec. 1254, United States Code.

QUESTIONS PRESENTED

I

Was there error in affirming direction of a verdict of no cause for action at the conclusion of Plaintiff's case for false imprisonment after Plaintiff had shown arrest and detention brought about by the direct action of Defendant in the light of Michigan law which provides that mere imprisonment raises a presumption of illegality and establishes a prima facie case that must be rebutted by defendant under an affirmative plea of justification?

II

Did the District Court and the Circuit Court of Appeals violate the rule laid down by this Court in *Erie Railroad* v. *Thompkins*, 304 U. S. 64, in failing to apply the local law of Michigan to the facts before them in this case?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

The U. S. Circuit Court of Appeals for the Sixth Circuit has decided an important question of law in a manner that is in direct conflict with the applicable local law of the State of Michigan. The Court throughout confused the actions of malicious prosecution and false imprisonment, and as a result of this confusion arrived at the decision it did in this case. Legal theories of malicious prosecution are in no way applicable in this matter, for it is purely and simply an action for false imprisonment and applicable Michigan law on that subject was not followed. Through the application of the law of malicious prosecution instead of false imprisonment, the Court shifted the burden of proof and arrived at a completely erroneous decision under Michigan Law.

The basic law of Michigan on the subject of false imprisonment, which is the only law applicable here, has only three points as far as this case is concerned. They are: (1) Mere arrest establishes a prima facie case of false imprisonment against him who arrests or procures and directs the arrest; (2) In the absence of justification, plaintiff is entitled to go to the jury as against him who arrests or procures the arrest; and, (3) Probable cause where there is a false arrest is material only under a special notice in mitigation of punitive damages.

In malicious prosecution under the Michigan law, the burden is upon the plaintiff to show affirmatively the lack of probable cause. However, in false arrest the plaintiff

is not concerned under the Michigan law with lack of probable cause. He does not need to plead or to prove it. *Barker* v. *Anderson*, supra.

In the instant case, it affirmatively appears, because no warrant was issued and no intent to prosecute is evident, that there was a false arrest, that the defendant participated and reaped the benefit therefrom, and that it did not plead its own justification in defense. Therefore, the prima facie case against defendant herein was not rebutted and could not be rebutted because of the absence of a plea of justification. The lower court was therefore in error in adopting the rule of malicious prosecution and afforded the defendant a non-existent defense to plaintiff's claim. The confusion between malicious prosecution and false improsonment resulted in a complete mis-application of local law by the Circuit Court of Appeals.

In addition, on the petition for re-hearing, when this was pointed out to the Circuit Court of Appeals, it for a second time refused to follow the local law and the rule of *Erie Railroad* v. *Thompkins*, supra. On the petition for re-hearing, the Circuit Court of Appeals said, "The contention that mere arrest established a prima facie case of false imprisonment is too broad notwithstanding some generalizations to the effect in some of the Michigan cases. The plaintiff must also show that the arrest was unlawful. *Barker* v. *Anderson*, 81 Mich. 508-511, 45 N.W. 1108; *Lynn* v. *Weaver*, 251 Mich. 265, 267, 231 N.W. 579." (137) The cases cited by the Court in the instant case show clearly that a mere arrest does establish a prime facie case of false imprisonment and then shifts the burden of justifi-

cation to the defendant. Therefore, in affirming the District Court's action in granting the motion to dismiss at the close of plaintiff's case, wherein he showed arrest brought about by the defendant, the Court misapplied the Michigan Law and shifted the burden of proof to the plaintiff contrary to the Michigan Law in cases of false imprisonment.

In addition to the foregoing the Circuit Court of Appeals, in failing to afford to Petitioner the benefit of the ancient and venerable action of false imprisonment, has established a precedent for a policy which would deprive an injured person of one of his most effective remedies for violation of civil rights.

The law of Michigan is zealous in protecting an individual's basic freedom from infringement by false imprisonment, and it is advisedly so. In arriving at the conclusion which it did, the District Court, as did the Circuit Court in affirming, undermined the foundation of the Michigan local law in protecting civil rights against invasions of this kind in the Federal Courts.

The patent error in refusing to adopt the Michigan law of false imprisonment, not only deprives the petitioner of a substantial right, but, unless reversed, is precedent for the repetition of the error by other courts, and lends color to transgressions of the fundamental right to recover damages for false imprisonment. It will afford authority contrary to the law of Michigan by denying a remedy for future violations of civil rights.

RECORD

A certified copy of the transcript of record in this case in the United States District Court for the Eastern District of Michigan, Southern Division, and in the United States Circuit Court of Appeals for the Sixth Circuit, are filed herewith in accordance with Rule 38 of this Court.

PRAYER

Petitioner prays that a proper writ of certiorari be issued directed to the United States Circuit Court of Appeals for the Sixth Circuit that this cause may be reviewed and reversed, and that such other relief be granted as may be proper.

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SUPREME COURT OF THE UNITED STATES

.....Term, 1949

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Factual Statement

The facts in this case are set forth in detail in the Petition for Writ of Certiorari and consequently will not be repeated here.

ARGUMENT

Importance of Questions of Local Law Involved

It is respectfully submitted to this Honorable Court that highly important questions of local law were decided by the Circuit Court of Appeals contrary to the law of Michigan. The question is of great importance because it involves protection of a right given for years by the common law and further, the protection of basic civil rights of the members of the community.

Legal Argument

The opinion of the lower court is based upon the theory of malicious prosecution when, in fact, the case involves not malicious prosecution but the separate and distinct common law action for false arrest and imprisonment.

When the appellant showed that he was arrested and detained by the Hamtramck police, he established a prima facie case of false arrest and imprisonment. Nothing more was required.

> " * * * The mere fact that a person has been imprisoned is sufficient in itself standing alone to raise the presumption that it was illegal; * * *"
>
> *Barker* v. *Anderson*, 81 Mich. 508, 511-512.

If the defendant through its agents caused, procured, directed, furthered, countenanced, encouraged or participated in either the arrest or the continued detention of the petitioner, it is liable with the Hamtramck police and any

other participants from the mere fact of the arrest and nothing more. *Thompson* v. *Stoddard,* 112 Mich. 687; *Stensrud* v. *Delamater,* 54 Mich. 144. As against this prima facie case, the defendant may plead justification. This justification must be pleaded specifically as an affirmative defense, and in the absence of an affirmative special plea of justification, the defense is not open. *Barker* v. *Anderson* (supra); *Stensrud* v. *Delamater* (supra).

Lack of probable cause is no part of the plaintiff's pleading or proofs in seeking actual or punitive damages under the Michigan law. Probable cause is an affirmative defense only in mitigation of punitive damages, and is not admissible under a plea of the general issue.

It is not the claim of petitioner herein that respondent set in motion the legal machinery of the criminal law by making a complaint in writing before a magistrate with the consequent issuance of a warrant and the lawful arrest of the petitioner. If this were the claim, the action would be one for malicious prosecution. The action here, however, is not for that, but for false imprisonment, and it is herein that the lower court erred in its decision in this case.

The actions of false imprisonment and malicious prosecution are readily distinguishable and fundamentally different. Modern text writers recognize the distinction between the two actions.

> "An action for false imprisonment is closely akin to the actions for malicious prosecution, abuse of process and vexatious suit. A state of facts may

constitute both a false imprisonment and a malicious prosecution and joinder of the actions in the same complaint is frequently permitted. *Both courts and text writers have sometimes confused these causes of action and thereby fallen into error in their statement of the law.* * * *. *In false imprisonment, the essence of the tort consists in depriving plaintiff of his liberty without lawful justification and the good intention of the defendant does not excuse, nor does his evil intention create, the tort.* * * * An action for abuse of process is to be distinguished from one for false imprisonment in that in the former action the process is valid and in itself justifies the restraint or imprisonment. Wrong in such cases arises from the oppressive or fraudulent use of the process, and the form of action is case. Although malicious prosecution and false imprisonment are frequently confused, *the distinction between them is fundamental.* In the case of malicious prosecution, as in abuse of process, valid process justifies restraint or imprisonment and the gist of the cause of action is malice or evil intent. The injury suffered by the plaintiff results only indirectly from the wrongful act— * * *." 22 *Am. Jur.*, pp. 354, 355 (italics ours).

"According to the greater weight of authority, *the want of probable cause is not an essential element of the action for false imprisonment and the presence of probable cause for the imprisonment is not generally a defense to the action.* Where both false imprisonment and malicious prosecution are alleged and the former is proved in an action, *the existence of probable cause for the prosecution constitutes no ground for a peremptory instruction to find for the defendant*, or for setting aside a verdict for the plaintiff. However, the question of probable cause becomes material when punitive damages are sought where the issue is the justification of the making by an officer or a private person of an arrest for a

> felony without a warrant, where the action is brought after the plaintiff's conviction on, or plea of guilty to, an offense for which he was arrested without a warrant or where the defense to the act is that the defendant was acting in protection of his person or property." 22 *Am. Jur.*, p. 370 (italics ours.)

Another text discussing the distinction between false imprisonment and malicious prosecution says:

> "False imprisonment again must be distinguished from malicious prosecution. The interests protected are different, though somewhat akin. False imprisonment is the invasion of the interest in freedom from unlawful confinement while malicious prosecution is the unlawful use of legal procedure to bring about a legal confinement. If the imprisonment is under legal process but the action has been carried on maliciously and without probable cause, it is malicious prosecution. If it has been extra judicial, without legal process, it is false imprisonment. At common law, the proper action for a false imprisonment was trespass whereas for malicious prosecution, it was case." *Harper on Torts*, p. 52.

In the case at bar, no complaint was made by anyone, no indictment or warrant was issued against petitioner. What the lower court designates as a written complaint (104) was actually only a police write-up (Ex. 2, p. 87). It is entitled "Report on Case Investigated". The word "complaint" appearing therein is only the officer's conclusion as to the crime for which formal complaint could be made before a magistrate to initiate prosecution. When this police write-up reaches the prosecuting attorney, it may, or may not, be the basis for a formal complaint

depending upon the determination of a legal mind as to whether or not the facts justify prosecution. If it is determined by the prosecutor that the facts do warrant prosecution, a formal written complaint containing a full and fair statement of the facts alleged to constitute a crime is executed under oath before a magistrate as a basis for the issuance of a warrant which culminates in the lawful arrest of the accused.

No formal written complaint was made to a magistrate in the case at bar, and consequently malicious prosecution is not involved and the law applicable to malicious prosecution employed by the lower court in arriving at its conclusion is clearly erroneous.

The fundamental difference between malicious prosecution and false imprisonment is well recognized by Michigan courts and is the established law of Michigan. *Stensrud* v. *Delamater* (supra); *Barker* v. *Anderson* (supra); *Thompson* v. *Stoddard* (supra); *Bailey* v. *Loomis,* 228 Mich. 338. In malicious prosecution, the essence of the action is the damage resulting from the fraudulent assertion or withholding of material facts which sets in motion the judicial process. In false imprisonment, the arrest *alone* establishes the cause of action. *Barker* v. *Anderson* (supra).

Analysis of Errors in Opinion of Circuit Court of Appeals

Recognizing the essential difference between false imprisonment and malicious prosecution set forth in the local law of Michigan and in the general law, some space

should be devoted to an analysis of the errors in the opinion of the Circuit Court of Appeals which caused it to reach a conclusion contrary to the local law in violation of the rule of *Erie Railroad* v. *Tompkins,* 304 U.S. 64, and affect civil rights in Michigan generally. In the opinion (102) the Court stated:

> "The appellant contends that by this evidence he has shown that the appellee through its agents caused or directed the arrests of the appellant and that this constituted a prima facie case, throwing the justification for the arrest upon defendant. *Stensrud* v. *Delamater,* 56 Mich. 144; *Barker* v. *Anderson,* 81 Mich. 508; *Bailey* v. *Loomis,* 228 Mich. 338."

These cases state the law as we have contended, and clearly distinguish between pleading false imprisonment and malicious prosecution. *Barker* v. *Anderson* shows clearly that the plaintiff needs only to show arrest or imprisonment, and that fact, standing alone, is sufficient to raise the presumption of illegality. The next few cases cited by the Circuit Court of Appeals do not upset the rule just stated, which is the Law of Michigan, but deal with subjects not analogous to this issue.

Poupard v. *Dumas,* 105 Mich. 326, was an action for both false imprisonment and malicious prosecution. Plaintiff was arrested for obtaining money under false pretenses. A complaint was made to a police magistrate in Detroit by defendant. One of the defenses on trial was that the defendant, before making the complaint, stated all the facts and circumstances within his knowledge to an attorney, Chapman, and relied upon his advice. The

attorney advised the making of a complaint after hearing the complainant's statement, accompanied him to the magistrate's office, and there, in the presence of defendant, laid the case before the magistrate stating fully the facts communicated to him by his client. The magistrate stated he would send an officer for the plaintiff but would not at that time issue a warrant, and if the defendant were needed the magistrate would send for him. The attorney remonstrated with the magistrate about arresting plaintiff without a warrant but the magistrate insisted that the arrest be made that way. The case is not authority for the matter at bar, for rather than aiding, abetting, procuring, directing or assisting in the arrest, the attorney in this case remonstrated against it. Consequently, the Court was correct in giving judgment for the defendant, and as stated before, the case is not in any way analogous to the instant one.

Shinglemeyer v. *Wright*, 124 Mich. 230, involved an action for slander and false imprisonment. Plaintiff was arrested by the Detroit police when she told the policeman, not in the presence of defendant, that defendant had accused her of theft. There was no evidence that defendant asked that plaintiff be arrested, and he was not present when the arrest took place. There was no showing that he ever did more than accuse plaintiff privately of larceny, which accusation was repeated by plaintiff to a police official and led to her arrest. The Court properly held for defendant, but again the case is not analogous for there was obviously no request, procurement, direction, or participation by the defendant for or in the arrest of the plaintiff.

In *Burlington Transportation Company* v. *Josephson*, 153 F 2d, 372, the action was one designated as false imprisonment. It was in fact one which under the Michigan law would have been malicious prosecution. Spargur, an agent for the Burlington Transportation Company, claimed that plaintiff was causing a disturbance on a bus operated by defendant company and requested the police to remove the plaintiff from the defendant's vehicle. He was told that he would have to sign a complaint and one was drafted charging violation of the City Ordinance and alleging that plaintiff was disturbing the peace. Plaintiff's name not being known to Spargur, none was inserted in the complaint. Spargur signed the complaint but did not swear to it. No warrant for the arrest of plaintiff was issued but the complaint itself was delivered to the police officers, who proceeded to the bus and arrested plaintiff without a warrant. There was no shownig that the signing of the complaint was not such a procedure as would legally start the machinery of the criminal law in motion, nor was it shown that Spargur intended to do anything other than comply with the law in making the complaint. Further, there was no showing that Spargur participated in the arrest or that he affirmatively instigated, directed, procured, encouraged, incited or caused the unlawful arrest. The complaint did not allege and the proofs did not show that Spargur or the defendant company instigated the unlawful arrest. Consequently, the case is not analogous to the instant case. As in the *Poupard* case (supra), Spargur followed legal procedure, made a complaint to the proper authority, and was thereafter not liable for the acts of the officers in the discharge of their duties over which he had and assumed no control.

Further, the decision in the *Burlington* case is authority for the maintenance of the instant case. In the words of the *Burlington* decision, if the defendant in the case at bar through its agents "affirmatively instigated, encouraged, incited or caused the unlawful arrest" of the petitioner and if respondent's agents took some part in furthering the arrest or urging the detention of the petitioner, it is liable. *We submit that this case supports petitioner's claim since the record shows herein that respondent's agents directed, urged and encouraged the detention of petitioner by instructing the officers to hold him without charges until such time as he paid $2,210.00.*

Richardson v. *Empire Trust Company,* 230 Mo. App. 580, cited by the lower court, involved an action designated as one for false imprisonment. The petition alleges that defendant slandered and libeled the plaintiff and thus caused one Cushman to lodge a complaint with the prosecuting attorney charging the issuance of a check with intent to defraud. The complaint was made to the prosecuting attorney, who thereupon caused the arrest of the plaintiff. This arrest was made summarily without process. A demurrer to the petition was sustained by the court. The opinion says in part as follows:

> "The petition herein discloses upon its face that plaintiff was arrested by a deputy constable of Buchanan County summarily, without a warrant, and held imprisoned in the county jail upon the direction of the prosecuting attorney of said county, upon a complaint lodged with him against her by one Cushman, which complaint thereafter was found to be groundless and unwarranted, and that she was discharged. *It is nowhere alleged in the peti-*

> *tion that the defendant advised, counselled or even suggested to Cushman that he make such complaint or that it advised or even suggested to the prosecuting attorney that he act upon such complaint and cause plaintiff's arrest. It is nowhere alleged in the petition that the defendant was present at the time that her arrest was made, encouraging the officer to make it, or that it ever advised, counselled or countenanced such arrest. It is nowhere alleged that the defendant sought or procured plaintiff's arrest and imprisonment.* * *" (p. 587) (italics ours).

The Circuit Court of Appeals in its opinion rendered in this case says:

> "It is, however, the law of Michigan that one who merely gives information regarding an offense does not incur liability even though the party giving the information acted maliciously or without probable cause. * * *" (102-103)

We conclude that the Court relied for its authority in making this statement on the next following paragraph taken verbatim from the opinion in *Richardson* v. *Empire Trust Company* (supra). We have capitalized that portion of the opinion omitted by the lower court which is pertinent to the issue involved:

> "One who merely gives information regarding an offense JUSTIFYING ARREST does not incur liability even though in giving such information he acts maliciously or acts without probable cause, UNLESS HE GOES BEYOND SUCH POINT AND INSTIGATES THE ARREST BY SUGGESTION AND ENCOURAGEMENT AND COUNTENANCES IT. * * *" (p. 588).

We submit that the *Richardson* case is authority for petitioner's case because the Missouri court recognized that where one "instigates the arrest by suggestion and encouragement and countenances it", he is liable. *That is exactly what the plaintiff herein charges.* The lower court in omitting the words "justifying arrest" and "unless he goes beyond such point and instigates the arrest by suggestion and encouragement and countenances it", overlooked the heart of the decision.

The lower court adopted the definition of false imprisonment from *Director General* v. *Kastenbaum,* 263 U. S. 25. (103) That case involved two separate counts, one for false imprisonment, and one for malicious prosecution, the latter count having been dismissed, and a verdict for false imprisonment having been sustained. The facts are that the railroad detective, agent for the Director General of Railroads, in an attempt to discover the owner of a horse, through whose ownership he sought to apprehend a criminal, informed the police authorities of Buffalo that the plaintiff had a horse answering the description, and two policemen were detailed to accompany him to Kastenbaum's house, where they arrested Kastenbaum, took him to the police station and kept him overnight. The following morning a complaint was made, hearings were had before a magistrate on a charge of grand larceny and burglary, and the plaintiff subsequently discharged. This was all of the participation shown by the agent of the Director General of Railroads. Notwithstanding, recovery was sustained against the Director General. Under the charge of the court in the *Kastenbaum* case the jury was permitted to return only compensatory damages:

"The action for false imprisonment is in the nature of a trespass for a wrong or illegal act in which the defendant must have personally participated directly or by indirect procurement. The gist of it is an unlawful detention, and that being shown the burden is on the defendant to establish probable cause for the arrest. The want of a probable cause, certainly in the absence of proof of guilt or conviction of the plaintiff, is measured by the state of the defendant's knowledge, not by his intent. It means the absence of probable cause known to the defendant when he *instituted the suit*. But the standard applied to defendant's consciousness is external to it. The question is not whether he thought the facts to constitute probable cause, but whether the court thinks they did. Holmes on Common Law, 140. * * *" (Italics ours.)

The foregoing reference to Holmes on the Common Law, quoted by the court in the *Kastenbaum* case, is taken from the author's discussion of the action of *malicious prosecution*:

"The next form of liability is comparatively insignificant. I mean the action for MALICIOUS PROSECUTION. A man may recover damages against another for maliciously and without probable cause instituting a criminal, or, in some cases, a civil prosecution against him upon a false charge. The want of probable cause refers, of course, only to the state of the defendant's knowledge, not to his intent. It means the absence of probable cause in the facts known to the defendant when he INSTITUTED THE SUIT. But the standard applied to the defendant's consciousness is external to it. The question is not whether he thought the facts to constitute probable cause, but whether the court thinks they did." *Holmes, The Common Law,* p. 140.

Reference to probable cause has no reference to actual damages, as will become apparent from the cases cited hereafter. Probable cause applies to an action for malicious prosecution only as a defense, and applies in false imprisonment only to that part of the claim for damages which are "added", or punitive, damages. The United States Supreme Court, in the *Kastenbaum* case expressly remarked that under the charge of the court the jury was permitted to return only compensatory damages on the false imprisonment count.

Liability for false arrest attaches regardless of intent of the defendant. The only time probable cause could merit consideration would be under an affirmative defense, specially pleaded in mitigation of punitive damages. Since the complaint in the case at bar was dismissed at the conclusion of plaintiff's proofs, no evidence of justification is shown by the record, and probable cause in mitigation of punitive damages is not before the court. Nor is want of probable cause before the court, because the action is not one for malicious prosecution.

In applying the law of malicious prosecution and thereby imposing the burden of showing lack of probable cause upon the appellant, the court has adopted the proposition that the supposed good faith of Gardas and Obarzanek redounds to the benefit of the defendant, instead of treating the defendant as a joint tort feasor with them and the Hamtramck police.

We submit that none of the cases cited by the lower court, reviewed above, support the opinion of that court when considered in the light of the distinction between

false arrest and malicious prosecution, but all of them recognize the liability of a person who participates in, incites, procures, encourages, aids and abets the arrest, or detention, as established by Michigan law.

The supreme court of Michigan has never departed from the rule that where a person is arrested without a warrant, the question of probable cause is one of defense, that the lack of probable cause is no part of the plaintiff's affirmative allegations or proofs. Being a defense to the action, it must be affirmatively pleaded, and is not available under a plea of the general issue:

> "The defense that the defendant has probable cause to believe that plaintiff had been guilty of a felony was inadmissable under the pleadings. Notice of this defense should have been given. Mr. Chitty says:
>
> 'Whoever assaults or imprisons another must justify himself by showing specially to the court that the act was lawful. And a plea justifying an arrest of the plaintiff upon the ground that a felony had been committed, and that there was reasonable ground to suspect and accuse the plaintiff, must distinctly state the specific reasons for suspecting the plaintiff. These are positive rules of law in order to prevent surprise on the plaintiff at the trial by the defendant then assigning various reasons and causes of imprisoning the plaintiff of which he had no notice and which consequently he could not be prepared to meet at the trial on the plea of not guilty, on fair and equal terms with respect to the evidence and proof of facts." 1 *Chit. Pl.* 501; *Wade* v. *Chaffee*, 8 R.I. 224; *Boynton* v. *Tidwell*, 19 Tex. 118.'

> "It is manifestly of more importance to the plaintiff that he should be informed by the plea of the facts relied upon for his arrest without a warrant than when he is arrested upon a warrant, which he has the right to see and read when he is arrested. * * *" *White* v. *McQueen,* 96 Mich. 249, 253.

Good faith of the party causing the arrest is no defense as against a claim for actual damages. It is only material as against a claim for exemplary damages.

> "* * * As to the fourth (request) whether Burroughs had or had not reasonable or probable cause for making the complaint, was wholly immaterial, except as it might affect the question of exemplary damages. His good faith could not prevent the plaintiff from recovering the actual damages he had suffered from the alleged false imprisonment." *Livingston* v. *Burroughs,* 33 Mich. 511, 514.

All persons who participate in, aid, encourage or countenance false imprisonment are liable as joint tort feasors.

> "Where several persons unite in the wronful act, the extent of individual participation is immaterial upon the question of liability. Each is equally liable, jointly and severally, regardless of whether a conspiracy to do the act had theretofore been entered into. * * *"

> "All those who, by direct act or *indirect procurement,* personally participate in, or proximately cause, the false imprisonment or unlawful detention are liable therefor. * * *" 22 *Amer. Jur., False Imprisonment,* Secs. 30 & 31.

Further, the plaintiff may join any or all of the participants, and his failure to join other persons equally liable does not constitute a defense.

> "* * * Failure of the plaintiff to join as defendants other persons equally liable with the person sued or the fact that a codefendant is held not liable is not a defense."

> "The question who can be made defendants in an action for false imprisonment depends on the substantive law imposing liability or conferring exemption. All who are liable together under the principles discussed in this article are joint wrong doers, and by the general rules of law the injured person may sue all of them, any one, or as many as he chooses. * * *" 22 *Amer. Jur., False Imprisonment,* Secs. 90 & 100.

Where a police officer makes an arrest, wrongful in its inception, other officers who assist in the continuance of the wrongful imprisonment are responsible for the entire damages thereby caused the plaintiff, although they had no knowledge of the unlawfulness of the imprisonment, and intended to act in the strict discharge of their official duties. *Cook* v. *Hastings,* 150 Mich. 289.

The lower court has erroneously defined the elements of false imprisonment.

> "The essence of a claim for false imprisonment is that the imprisonment must be false—i. e., without probable cause. * * *" (105)

It is our contention that this is wrong, and we apply the law we have cited to demonstrate the error:

1. The mere fact of arrest establishes a prima facie case of false imprisonment.

2. All who participate in an arrest are prima facie liable.

3. If those arresting and participating wish to rebut the prima facie case, they may do so by pleading and proving their own justification by legal process or otherwise. But this is an *affirmative defense* and is not a requirement of the plaintiff's pleadings or proofs.

4. In addition to justification, the tort feasors may plead presence of probable cause, not as an ingredient of justification, but only in mitigation of punitive damages. Absence of probable cause, like justification, is not part of plaintiff's pleadings or proofs.

The lower court mis-stated the gist of false imprisonment, the foundation of the case at bar, and in having made that error, further stated in the opinion:

> "* * * They (Obarzanek and Gardas) had ample cause to complain; * * *" (105).

This conclusion is based upon an erroneous definition of the legal theory involved in the case at bar. The lower court erred further both in its opinion on the original case and in its opinion on rehearing. In the opinion on the original case it stated that Obarzanek had made a written complaint to the Hamtramck police. The court at

that time must have considered this analogous to a formal complaint before a magistrate and upon this false premise the court immediately adopted the law of malicious prosecution and transposed the burden of proof. When this error was pointed out to it in the petition for rehearing and it was shown that no written complaint was ever made, the lower court agreed to that fact but stated in its opinion on rehearing that these errors had no effect on the conclusion arrived at in the case. (137)

In so holding upon its decision on rehearing, it is submitted that the court flew directly in the face of the established law of Michigan on false imprisonment and malicious prosecution and completely confused the issue in this case. It clearly failed to follow the Michigan law of false imprisonment in superimposing upon a false imprisonment case the standards of a malicious prosecution action. Consequently, the court by the adoption of the wrong definition and theory proceeded upon a false premise, that is, that the existence or non-existence of probable cause was material. Probable cause was not before the District Court on motion for directed verdict, and could properly be before the court only after a full trial of the merits, and then only in the consideration of punitive damages. Further, in its opinion on rehearing, the court stated:

> "The contention that mere arrest establishes a prima facie case of false imprisonment is too broad notwithstanding some generalization to that effect in some of the Michigan cases. The plaintiff must also show that the arrest was unlawful (citing cases). Nor are we persuaded that proof of probable cause is material only in mitigation of punitive damages.

> Were we to accept the appellant's argument, the necessary result would be that for every arrest, however made, there would be liability. Such, we think, cannot be the law either in Michigan or anywhere else." (137)

Herein it is the contention of petitioner that the lower court erred completely, and refused to follow the rule of *Erie Railroad* v. *Thompkins* (supra). The cases cited by the court to support its statement that the plaintiff must also show that in addition to mere arrest, that the arrest was unlawful, do not so hold. The Michigan law is clear, and the cases cited show it to be clear, *that mere arrest establishes a prima facie case of false imprisonment.*

CONCLUSION

Petitioner herein having shown the arrest established a prima facie case, and no plea of justification having been made by the defendant in its own behalf, the Circuit Court, in affirming the decision of the District Court, was in error because it failed to adopt the local law of Michigan in accordance with the rule of *Erie Railroad* v. *Tompkins,* 304 U. S. 64.

RELIEF PRAYED

Petitioner respectfully submits that his petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit be granted.

Respectfully submitted,

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